

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

TEAM WORLDWIDE CORPORATION,	
Plaintiff,	Case No. 2:19-cv-92-JRG-RSP
v.	LEAD CASE
ACADEMY, LTD D/B/A ACADEMY SPORTS + OUTDOORS,	
Defendant.	
ACE HARDWARE CORPORATION,	Case No. 2:19-cv-00093-JRG-RSP
AMAZON.COM, INC, AMAZON.COM LLC,	Case No. 2:19-cv-00094-JRG-RSP
BED BATH & BEYOND INC.,	Case No. 2:19-cv-00095-JRG-RSP
COSTCO WHOLESALE CORPORATION,	Case No. 2:19-cv-00096-JRG-RSP
DICK'S SPORTING GOODS, INC.,	Case No. 2:19-cv-00097-JRG-RSP
THE HOME DEPOT, INC.,	Case No. 2:19-cv-00098-JRG-RSP
MACY'S, INC., MACY'S.COM, LLC,	Case No. 2:19-cv-00099-JRG-RSP
TARGET CORPORATION, and TARGET BRANDS, INC.,	Case No. 2:19-cv-00100-JRG-RSP
SEARS, ROEBUCK AND CO., SEARS HOLDINGS CORPORATION, and TRANSFORM HOLDCO LLC,	Case No. 2:20-cv-00006-JRG-RSP
Defendants.	CONSOLIDATED CASES

**DEFENDANTS' OBJECTIONS TO THE REPORT AND RECOMMENDATION
ON THE MOTION FOR SUMMARY JUDGMENT OF INVALIDITY
FOR LACK OF WRITTEN DESCRIPTION**

[REDACTED]

Pursuant to Fed. R. Civ. P. 72(a) and Local Rule CV-72(b), Defendants respectfully object to the Magistrate Judge's Report and Recommendation on Defendants Motion for Summary Judgment of Invalidity for Lack of Written Description. (*See* Dkt. No. 449 ["Report and Recommendation"].) In the Report and Recommendation, the Magistrate Judge determined that "a reasonable jury may find Figures 13A, 13B, 14, and 15 are sufficient to disclose a non-detachable pump body that is partially recessed into the inflatable body to a person of ordinary skill in the art." (*Id.* at 12.) This was clearly erroneous and contrary to law.

I. Background

U.S. Patent No. 9,211,018 (the "'018 Patent") includes two independent claims: claims 1 and 14. (Dkt. No. 1-1, at 32.) Claims 1 and 14 each recite the limitation: "wherein the pump body is built into the exterior wall and wholly or partially recessed into the inflatable body." (*Id.*) The Court construed "built into" as having its plain and ordinary meaning, which includes a "not detachable from" requirement. (Dkt. No. 177, at 24.) The Magistrate Judge correctly determined that this limitation is directed to two separate and distinct species: (1) a non-detachable, wholly recessed pump body species (the "Non-detachable, Wholly Recessed Species"); and (2) a non-detachable, partially recessed species (the "Non-detachable, Partially Recessed Species"). (Report and Recommendation, at 8.) In so doing, the Magistrate Judge correctly rejected TWW's argument to the contrary. (*Id.* ("While 'partially recessed' does require the pump body be recessed to some degree, the differentiation between 'wholly or partially recessed' indicates 'partially recessed' excludes 'wholly recessed.' Accordingly, TWW's first argument does not follow."))

The '018 Patent claims priority to U.S. Patent Application No. 09/738,331 (the "As-Filed Specification"), which was filed on December 18, 2000 and ultimately matured into U.S. Patent No. 6,793,469 (the "'469 Patent"). (Dkt. No. 1-1, code (60).) TWW maintains that the '018 Patent

is “entitled to a priority date at least as early as the filing date of the [As-Filed Specification.]” (Dkt. No. 245, at 6.) Thus, there is no dispute that written description support for the ’018 Patent must be found, if at all, in the As-Filed Specification and, more specifically, the eighth (Figs. 13A, 13B), ninth (Fig. 14), and tenth (Fig. 15) embodiments of the As-Filed Specification. (*Id.* at 1-3.) For reference, these embodiments are reproduced below:

Eighth Embodiment (Figs. 13A, 13B)

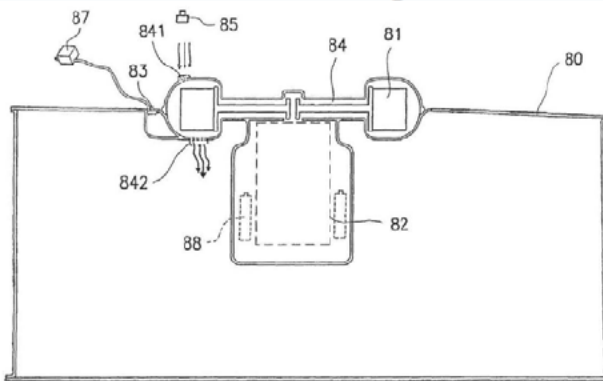


FIG. 13A

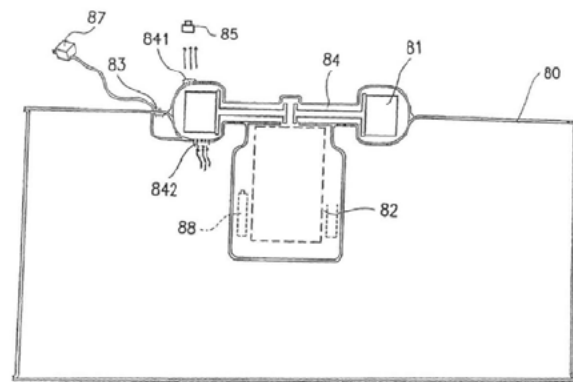


FIG. 13B

Ninth Embodiment (Fig. 14)

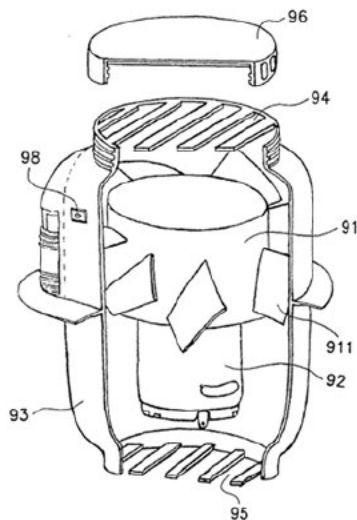


FIG. 14

Tenth Embodiment (Fig. 15)

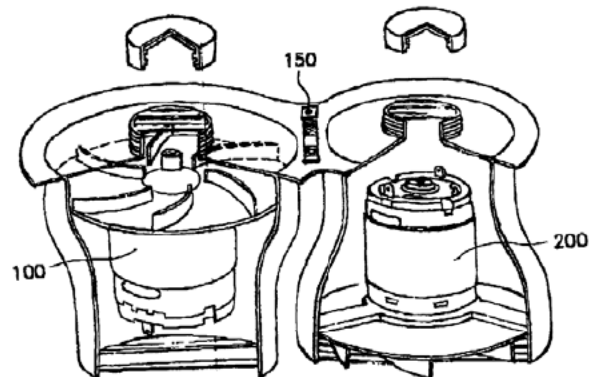


FIG. 15



II. Argument

The Report and Recommendation is clearly erroneous and contrary to law for several reasons.

First, the Report and Recommendation erroneously determined that the tenth embodiment (Figure 15) may provide support for the Non-detachable, Partially Recessed Species. (Report and Recommendation, at 12.) However, TWW did not dispute that the tenth embodiment disclosed only a wholly recessed (as opposed to a partially recessed) pump body arrangement. (*Compare* Dkt. No. 209, Statement of Fact [“SUF”] No. 5 (stating that the tenth embodiment is directed to a “wholly recessed” arrangement), *with* Dkt. No. 245, at 7 (not disputing that fact).) Thus, pursuant to this Court’s Local Rules and basic summary judgment practice, the tenth embodiment does not provide support for the Non-detachable, Partially Recessed Species. *Regions Equip. Fin. Corp. v. AT 2400, Off. No. 530775*, No. 1:10-CV-215, 2010 WL 11531292, at *3 n.5 (E.D. Tex. Sept. 2, 2010), *aff’d*, 640 F.3d 124 (5th Cir. 2011) (“Under Local Rule CV-56(c), the court assumes that the facts as claimed and supported by admissible summary judgment evidence by the moving party are true, unless controverted by the non-moving party in its response and supported by admissible summary judgment evidence.”). Indeed, if the Magistrate Judge were correct regarding the tenth embodiment, the ’018 Patent would be invalid for a different reason—specifically, the ’018 Patent would lack written description support for the Non-detachable, Wholly Recessed Species, as the only remaining relevant embodiments (the eighth and ninth embodiments) are directed to partially recessed arrangements. (*Compare* Dkt. No. 209, SUF Nos. 6 and 7 (stating that the eighth and ninth embodiments are directed to “partially recessed” arrangements), *with* Dkt. No. 245, at 7 (not disputing these facts).)

Second, the Report and Recommendation overlooks determinative evidence—in the form

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of testimony from TWW’s expert (Dr. Stevick) and TWW’s own public admissions—that the As-Filed Specification is silent as to the non-detachability of the pump body in the eighth and ninth embodiments. With respect to the eighth embodiment, Dr. Stevick testified that [REDACTED]

[REDACTED] (Dkt. No. 209-2 (Ex. 7), 184:3-10 (emphasis added).) Dr. Stevick testified similarly with respect to the ninth embodiment, acknowledging that [REDACTED]

[REDACTED]. (*Id.* at 186:6-12 (emphasis added), 186:22-187:9.)

TWW’s representations regarding the teachings of the As-Filed Specification for these embodiments in filings before the Federal Circuit are consistent with Dr. Stevick’s testimony. (Dkt. No. 291-2, at 17 (“[T]he specification is *simply silent* as to whether the Eighth and Ninth embodiments are detachable or not detachable” (emphasis added)); Dkt. No. 291-3, at 28.) In light of such evidence, no reasonable jury could find that the As-Filed Specification provides written description support for the Non-detachable, Partially Recessed Species. *Hyatt v. Boone*, 146 F.3d 1348, 1353 (Fed. Cir. 1998) (“It is insufficient as written description, for purposes of establishing priority of invention, to provide a specification that does not unambiguously describe all limitations.”). It was clear error for the Magistrate Judge to find otherwise and, notably, completely ignore this evidence in reaching that conclusion. (*See generally* Report and Recommendation.)

Third, the Report and Recommendation focuses on the disclosure of the ’018 Patent, rather than the As-Filed Specification. Specifically, the Court analyzed only Figures 13A, 13B, 14, and 15 of the ’018 Patent and explained that it was “persuaded by TWW’s argument that the figures are sufficient to disclose a non-detachable pump body that is partially recessed into the inflatable body.” (Report and Recommendation, at 8-12.) The Magistrate Judge’s focus on Figures 13A, 13B, 14, and 15 in the ’018 Patent—rather than the figures as they appeared in the As-Filed Specification

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that TWW relies upon for priority (Dkt. No. 245, at 6)—is contrary to black-letter law. *Ariad Pharm., Inc. v. Eli Lilly and Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (en banc) (“[T]he test for sufficiency is whether ***the disclosure of the application relied upon*** reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date.” (emphasis added)). It is also contrary to TWW’s own arguments, which focus on the “original drawings” in the As-Filed Specification, as binding authority requires. (Dkt. No. 245, at 11.) This is significant because neither Figure 14 nor Figure 15 in the As-Filed Specification disclose the inflatable body; instead, they simply disclose pumps. (*Compare* Dkt. No. 209-2 (Ex. 1), at TWW_CONSOL-00000075-0000076 (omitting reference numerals 90, 180 and corresponding disclosure), *with* Dkt. No. 1-1, Figs. 14 and 15 (including reference numerals 90, 180 and corresponding disclosure).) By focusing only on the ’018 Patent and not the As-Filed Specification, the Magistrate Judge overlooked this important omission.

III. Conclusion

For at least the foregoing reasons, Defendants respectfully object to the Magistrate Judge’s Report and Recommendation on Defendants Motion for Summary Judgment of Invalidity for Lack of Written Description. (*See* Dkt. Nos. 209, 449 [Report and Recommendation].) Defendants respectfully request that the Court not adopt the Report and Recommendation and instead enter an Order finding that the ’018 Patent is invalid.

Dated: June 18, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed electronically, under seal, in compliance with Local Rule CV-5(a)(7). A complete and unredacted copy of this document was served on counsel of record, all of whom have consented to electronic service, via email on June 18, 2021.

/s/ Reid E. Dodge

CERTIFICATE OF AUTHORIZATION TO FILE UNDER SEAL

The undersigned hereby certifies that Defendants' Objections to the Report and Recommendation on the Motion for Summary Judgment of Invalidity for Lack of Written Description is filed under seal pursuant to the Protective Order (Dkt. 94).

/s/ Reid E. Dodge